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No. 45

IN THE

SUPREME COURT OF THE UNITED STATES

JOE J. FISHER,
Petitioner

vs.

R. C. PACE, SHERIFF OF JASPER COUNTY, TEXAS,
Respondent

On Writ of Certiorari to the Supreme Court of the State of Texas

PETITION FOR REHEARING

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To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner is more than satisfied with the careful consideration which the Court has given this case. The question asked by the various Justices during the oral argument reflected complete familiarity with the record, and the opinions of the Court evi-

dence the study and the research which have been accorded the case. Consequently, it is with no sense of complaint and with considerable hesitancy over further encroaching upon the time of the Court that Petitioner presents this his Petition for Rehearing and respectfully requests the Court to reconsider its decision of February 7, 1949, to withdraw its opinion and judgment of said date, and to render judgment in his behalf. This Petition is based upon the following grounds and arguments:

I.

The majority of the Court stated on page 6 of its opinion that:

"In a case of this type the transcript of the record cannot convey to us the complete picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner of speaking, bearing, and attitude of the petitioner. Reliance must be placed upon the fairness and objectivity of the presiding judge."

From this statement and from the fact that Mr. Justice Douglas also alludes to demeanor in his dissenting opinion, Petitioner gathers that the Court is of the opinion that the transcript of the record conveys nothing concerning his expression or attitude when he spoke to the trial court, and that the Court is, at the very least, indulging in a presumption that his expression or attitude may have given his words a contemptuous flavor which the words themselves do not reveal.

If a situation in which the record reflects nothing concerning demeanor there doubtless is room for a presumption such as that mentioned above. However, the record in the case at bar is replete with evidence that Petitioner conducted himself as a gentleman throughout his colloquy with the trial judge and that he at no time demonstrated any disrespect, anger or intemperance towards the trial judge. Thus, on pages 16 and 17 of the record are contained an affidavit executed by all twelve of the jurors who were hearing the workmen's compensation case in which the allegedly contemptuous incident occurred. In the printed record, the names of only nine of the jurors are shown, and there are three blank lines. When the record was transcribed, counsel for Petitioner was told that the blank lines indicated illegible signatures. Lest there be any doubt about the matter and lest this Court believe that only nine of the twelve jurors executed the affidavit, there is transmitted herewith a certificate by the Clerk of the Supreme Court of the State of Texas reflecting the fact that the original affidavit on file in his office contains the signatures of all twelve jurors. In this affidavit the jurors, after reciting the facts pertaining to the contempt, state:

"nor at any time did Mr. Fisher raise his voice or conduct himself in such a manner that indicated disrespect for the Judge presiding; but rather on the other hand, Mr. Fisher at all times during the argument and ensuing colloquy with Judge Adams acted with dignity, spoke in moderate tones, indicative of respect for the court, and conducted himself in every respect as a gentleman."

Similarly, on pages 17 to 20 of the printed record, are three affidavits from bystanders at the trial in which the allegedly contemptuous incident occurred. The three bystanders also unite in saying that:

"He [Mr. Fisher] did not demonstrate any anger or temper. He did not raise his voice at any time he was talking to Judge Adams and did not talk in a discourteous or insulting manner, and did nothing which I would consider conduct unbecoming a gentleman. I did not see or hear Mr. Fisher say or do anything that could have reasonably caused Judge Adams to become so upset and excited and apparently lose all self-control."

As the record reflects, the Supreme Court of the State of Texas hears no evidence in an original proceeding for habeas corpus, and the facts are placed before it in affidavits and exhibits to the pleadings of the parties. The aforementioned affidavits by the jurors and by the bystanders were attached to Petitioner's Application for Writ of Habeas Corpus in the Texas Court, and the facts recited therein were in no way controverted or challenged by the Respondent, as he might have done under Texas procedure.

Consequently, with fifteen persons uniting in saying that the demeanor of Petitioner was in no way objectionable at the time of the occurrence of the allegedly contemptuous incident, and with these fifteen persons consisting of the twelve jurors who were hearing the case on trial and the three bystanders at the trial, Petitioner respectfully submits that the record herein precludes the application of any presumption that his words may have been spoken

with a contemptuous demeanor and makes most difficult the placing of any reliance upon the fairness and objectivity of the presiding judge. Hence, insofar as the opinion of the majority of the Court is founded upon such a presumption or reliance, Petitioner submits that the opinion is in error.

II.

After making the above quoted statements relative to demeanor, the majority of the Court proceeded to hold that Petitioner was guilty of persisting in an improper argument after being instructed by the trial judge to refrain from making such an argument. In connection with this holding, Petitioner respectfully requests the Court to review the facts, and Petitioner submits that at no time did he violate any intelligible instruction on the part of the trial court, or any principle of Texas law pertaining to jury arguments.

It is said by this Court that Petitioner's jury argument brought improper information to the attention of the jury and that Petitioner made a "stubborn effort to bring excluded matter to the knowledge of the jury." Let us examine Petitioner's argument in light of these charges. If Petitioner did bring improper information to the attention of the jury he did so by imparting one or all of the following three bits of information: (a) By telling the jury that one hundred and twenty-five weeks was the maximum compensation period permitted by law. (b) By telling the jury the average weekly compensation rate. (c) By revealing to the jury the fact

that compensation is computed according to the formula of compensation period multiplied by compensation rate.

(a) In connection with the fact that Petitioner told the jury that the maximum compensation period is one hundred twenty-five weeks, it should be noticed that Petitioner mentioned this fact three times. The first two times there was no objection by opposing counsel and no instruction by the trial court. The absence of any such objection or instruction is fully understandable, for telling the jury the maximum compensation period was eminently proper argument. Of the special issues which the trial court had submitted to the jury, two—Special Issues Nos. 3 and 6 (R. 11-12)—specifically inquired as to the compensation period, and it was entirely proper for Petitioner to tell the jury that their maximum finding on this could be one hundred and twenty-five weeks—and thereby to obviate the possibility of a mistrial caused by a finding for a longer period—and to argue that they should find the maximum period. If nothing else, the failure of opposing counsel to object to this statement, even though the statement was twice repeated, indicates the properness of such a statement and its customary use in workmen's compensation cases. Consequently, there can be nothing wrong about the bare statement that one hundred twenty-five weeks is the maximum period, and opposing counsel objected only when Petitioner began to combine such statement with the weekly compensation rate.

(b) As the record reflects, the first objection to Petitioner's argument arose when he started to men-

tion the compensation rate. This rate had been stipulated, and hence it doubtless would have been improper—though clearly not reversible error—if Petitioner had stated it to the jury. When Petitioner started to state such rate, the trial judge said "That has all been agreed upon"—a statement which is solely referable to the rate, for that was the only subject of the stipulation. When Petitioner attempted to state why it might be material to inform the jury of the rate, the trial judge responded "They are not interested in dollars and cents"—again a remark which is referable only to a statement of the rate. When Petitioner again attempted to state the materiality of the rate, he was told not to argue with the court and was informed that he would be given his exception. Petitioner took his exception and resumed his argument by stating "This negro, as I stated, can only recover one hundred and twenty-five weeks compensation, at whatever compensation the rate will figure under the law." If Petitioner is guilty of persisting in an improper argument it is because of this statement. Let us see what, if anything, is improper in such an argument. As is shown in (a) above, restating the matter of one hundred twenty-five weeks could not, standing alone, be objectionable. Petitioner refrained from informing the jury of the dollars and cents figure of the rate, and merely substituted the vague phrase "at whatever compensation the rate will figure under the law." Certainly this phrase, standing alone, cannot constitute improper argument. Consequently, if there was improper argument it was because Petitioner conjoined the two matters aforementioned

and thereby revealed to the jury the formula by which a compensation recovery is computed.

(c) If revealing the compensation formula to the jury was Petitioner's error—and it must have been if he committed any error at all—two matters of extreme importance stand out:

(1) *At no time did the trial court ever instruct Petitioner not to reveal to the jury the compensation formula.* Rather, the only thing that Petitioner was ever told by the trial court was that the jury is not interested in dollars and cents. Obviously, a man cannot be held in contempt for violating an instruction when he has received no instruction. Obviously also, under the holding in *N.L.R.B. v. Bell Oil & Gas Co., et al.*, 98 F. (2d) 405, a man cannot be held in contempt for violating an instruction which is ambiguous or unintelligible.

(2) If it be thought that there was vice in revealing the compensation formula to the jury, because such revelation informed the jury of the effect of their answers, and if it be thought that Petitioner should have recognized this, and, even in the absence of an instruction, should have refrained from stating the formula to the jury, the error in any such thoughts is revealed by the very language which the Texas Supreme Court used in discussing this case. Thus, the Texas Court stated that it is error to inform the jury as to the effect of their answers to special issues "unless, under the circumstances in the court below, the issues are such that men of ordinary intelligence would be presumed to know the legal effect of their answers." Can it be thought that any juror would be so ignorant as not to know that

recovery in a compensation case is based upon the duration of the injury, especially when the court submits express issues inquiring as to such duration? In the usual compensation case in which the compensation is not stipulated, as it was in the case at bar, but is the subject of proof, the jury is asked to find both the rate and the duration. Can it be thought that any except the most illiterate juror would be unable to put these two inquiries together and see where they lead? If Petitioner imparted any information whatsoever to the jury when he made the argument in question, it added not a whit to the information which the jurors, as men of ordinary intelligence, already possessed, and, hence under the Texas law as stated by the Texas Supreme Court, such an argument could not have been improper.

III.

Near the end of the majority opinion this Court stated "the petitioner twice refused to heed the court's admonition not to argue the point." It is of course true that the trial judge twice told Petitioner "don't argue with me"—indeed, these two instructions were the only positive instructions which Petitioner ever received, for the other remarks by the judge concerning the "dollars and cents" were in the nature of comments, rather than of orders or instructions. Now let us see how Petitioner responded to these two instructions. The first instruction, and the response, are as follows:

"By the Court: Don't argue with me. Go ahead. I will give you your exception on it.

"By Mr. Fisher: Note our exception.

"By the Court: All right."

Certainly there was no violation of the instruction in this exchange. Petitioner resumed his argument at this point, and was interrupted by the statement of opposing counsel that he was objecting to any discussion "as to what the plaintiff can recover." After this objection, the following remarks were made:

"By the Court: Gentlemen! Mr. Fisher, you know the rule, and I have sustained his objection.
"By Mr. Fisher: I am asking—"

Petitioner is certain that this Court has not meant to say that he violated an instruction not to argue with the trial court by starting to ask a question. Even if it could be thought that the question, if asked, might have been improper, Petitioner was never even afforded an opportunity to indicate the nature of the question. Moreover, it is apparent from the record—and is true in fact—that it was at this moment that Petitioner first realized that the trial court must have been telling him something more than to refrain from stating the compensation rate, and Petitioner started to inquire just exactly what the court had ruled. Petitioner was never enabled to make this inquiry, for the trial judge cut him off short by saying:

"Don't argue with me. Gentlemen, don't give any consideration to the statement of Mr. Fisher."

To this, Petitioner responded:

"Note our exception. I think I have a right to explain whether it is a specific injury or general injury."

If Petitioner at any time violated the judge's instructions against arguing with him, it was when Petitioner said "I think I have a right to explain whether it is a specific injury or general injury," but was this "arguing" with the judge? Under the Texas Rules of Practice and Procedure in Civil Actions, Rule 373, "formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court *and his grounds therefor*." Similarly, it is settled in Texas as in most other jurisdictions that a mere naked objection to action by the court is insufficient and that counsel must state the reasons for his objection. 41 *Texas Jurisprudence*, sec. 143, et seq. Consequently, if Petitioner had merely noted an exception in the remark last quoted above, his action would have been a nullity for the exception, and the objection implicit therein, would have been unaccompanied by any reason therefor. If Petitioner was to preserve his objection for appeal, and thereby to discharge his duty to his client, it was absolutely incumbent upon him to do as he did and to add the reason for his objection by stating "I think I have a right to explain whether it is a specific injury or general injury."

Hence, Petitioner respectfully submits, at no time did he refuse to heed the court's admonition not to argue. On the contrary, when he received the first such admonition, he resumed his statements to the jury, and when he received the second admonition

he stated only that which was absolutely indispensable to preserve the point for appeal. In its opinion this Court quoted with approval the language of the Texas Court to the following effect:

"It was thus the duty of counsel to abide by his [the trial judge's] rulings even if erroneous; and if any rights of his clients were violated the remedy was by exception and appeal."

Petitioner fully conformed with this rule of conduct, and the only language uttered by him which possibly could be deemed violative of the instruction against arguing was language which was absolutely necessary if Petitioner was to have a proper exception as a predicate for appeal.

WHEREFORE, Petitioner prays that this petition be granted, that this Honorable Court set aside its judgment and opinion of February 7, 1949, and that the Court enter judgment reversing the judgment of the Supreme Court of the State of Texas.

Respectfully submitted,

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I, R. Dean Moorhead, an attorney for Petitioner in the cause to which the foregoing Petition for Rehearing is directed, hereby state and certify that said Petition is presented in good faith and not for delay. I further certify that at the same time that I deposited in the United States Mails the forty copies of said Petition addressed to the Clerk of this Court, I also deposited three copies of said Petition addressed to Robert H. Hillin, Esq., whose address is County Courthouse, Jasper, Texas, the attorney for Respondent, with said copies being sent by registered mail.

R. Dean Moorhead